

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	CG Docket No. 02-278
Rules and Regulations Implementing)	
The Telephone Consumer Protection Act)	CG Docket No. 05-338
Of 1991)	

To: The Commission

REPLY COMMENTS OF CBS CORPORATION

CBS Corporation (“CBS”)¹ hereby submits these Reply Comments in response to the Notice of Proposed Rulemaking and Order (the “NPRM”) issued by the Federal Communications Commission (the “FCC” or the “Commission”) on December 9, 2005 regarding modifications of the Commission’s rules on unsolicited facsimile advertisements in light of Congress’s codification of the “established business relationship” exemption. CBS addresses several of the issues raised by the NPRM and urges the Commission to modify its rules to promote the privacy concerns sought to be protected by the Telephone Consumer Protection Act (“TCPA”) as modified by the Junk Fax Prevention Act of 2005 (the “Junk Fax Act”)² without imposing unnecessary restrictions that would create significant burdens on businesses

¹ CBS is a worldwide media company with operations in broadcast television and radio, cable television, television programming production and syndication, outdoor advertising, publishing, theme parks and digital media.

² Junk Fax Prevention Act of 2005, Pub. L. NO. 109-21, 119 Stat. 359 (2005).

seeking to operate in accordance with the law. In this regard, the Commission should recognize that the TCPA focuses on relationships between businesses and consumers while the majority of the relationships that the unsolicited facsimile advertisement rules relate to are business-to-business relationships, which involve different considerations.

CBS and its subsidiaries routinely rely upon facsimile transmissions to maintain contact with consumers, advertisers, vendors, and other parties with which CBS has existing relationships, both nationally and globally.

I.

The FCC's Rules Should Conform With the Junk Fax Act.

The NPRM sought comment on the FCC's proposal to delete the section of its rules that provides that a facsimile advertisement is considered "unsolicited" unless the recipient granted prior express invitation or permission in a signed statement clearly indicating consent to receive such facsimiles from the sender. CBS urges the Commission to make the proposed change, because the current rule directly conflicts with congressional intent: The Junk Fax Act explicitly permits a sender to transmit an unsolicited facsimile advertisement to recipients with which it has an "established business relationship." Clearly, the creation and maintenance of an established business relationship does not and should not depend on whether the party with whom that relationship exists has furnished written permission to send facsimile transmissions. As Congress recognized, the Junk Fax Act was "designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established business relationship without the burden of collecting prior written permission to send these recipients commercial faxes."³ Accordingly, the Junk Fax Act carve out of established business

³ S. Rep. 109-76 (2005).

relationships would be undermined by a signed statement of “prior express invitation” requirement.

II.

Rules Regarding an Established Business Relationship.

Under the Junk Fax Act, a sender may transmit an unsolicited advertisement by facsimile to recipients with which it has an established business relationship so long as the sender obtained the facsimile number either: (i) via a voluntary communication of the number from the recipient within the context of the established business relationship; or (ii) from a directory, advertisement or Internet site to which the recipient agreed to make the number available for public distribution.⁴

The NPRM sought comment on whether the FCC should establish parameters defining what it means for a person to provide a facsimile number within the context of an established business relationship. It would be difficult, if not impossible, to specify all methods by which a facsimile number could be provided within the context of such a relationship. Consequently, the Commission should make such determinations on a case-by-case basis, using a reasonableness standard. Rather than attempting to construct a complex, detailed rule that incorporates all of the possible methods by which numbers could be so obtained, the Commission should consider providing non-binding guidance on this issue.

The Commission also asks under what circumstances it should be recognized that a facsimile number was made available for public distribution and who has the burden of establishing that a proposed recipient made the number publicly available. Whether a potential recipient has made its facsimile number available for public distribution is similarly not readily

⁴ Junk Fax Act, § 2(a).

determinable. The Commission should establish a presumption that if the sender obtained a facsimile number from a publicly available directory or Internet site: (i) the compiler of that directory or Internet site proceeded in good faith; and (ii) that the recipient at such number voluntarily agreed to make the number available for public distribution. This presumption should be rebuttable if the recipient demonstrates that the sender had actual knowledge that the recipient did not want to receive unsolicited facsimile advertisements from the sender.

The Commission should also refrain from promulgating extensive rules requiring facsimile senders to retain documentation as to how all of its established business relationships – which in the case of large corporate enterprises could amount to hundreds or thousands of business alliances – were formed. Doing so would impose tremendous burdens on businesses, requiring them to maintain voluminous amounts of information contained in paper and/or an electronic format, creating a substantial record-keeping requirement for parties who rely on facsimile transmission but which are legitimately seeking to comply with the TCPA. While a sender should be required to demonstrate the existence of its established business relationships, the sender should have the flexibility to do so through the presentation of records or other information that it chooses in its discretion to retain rather than be subject to complex and extensive record-keeping requirements that may themselves subject the sender to potential liability under other privacy-related laws.

Further, a facsimile sender should not bear the burden of proving that a number obtained from a directory or list has been voluntarily made available for public distribution. To do so would require the sender to contact each of the intended recipients, which itself may be limited by other privacy-related laws, creating a “Catch-22” situation. To the extent that such facsimile numbers are obtained through a directory compiled by a third party, placing the burden to prove

that each number was made public on the sender would require each entity that uses the directory to contact each of the listings – resulting in multiple inquiries to each listing.

Moreover, because directory compilers are under no obligation to cooperate with each sender's inquiry, they are thus unlikely to respond to the potentially large number of requests they would receive – thereby limiting a sender's ability to utilize facsimile numbers that were provided by entities with the understanding that they would be made public and hindering the intent of the Junk Fax Act and interstate commerce. In instances where intended recipients are businesses, this would result in a significant burden on senders to confirm not only that the number was voluntarily provided, but that the person with whom the sender spoke at each of the proposed recipient businesses had the necessary authority to authorize receipt of the unsolicited advertisements.

Instead, the Commission should construct its rules so that any concerns regarding the use of publicly available directories or lists are addressed to the compilers of those directories or lists, who are in the best position to confirm that the information they are providing was intended to be made publicly available by the proposed recipients.

The NPRM also sought comment on whether an established business relationship may lapse after time, and if so, what the proper duration of such relationships should be. Under the FCC's rules regarding telephone solicitations, such relationships currently lapse 18 months after a purchase or transaction and 3 months after an inquiry or application has been made to the business.⁵ However, it should be noted that the telephone solicitation rules apply exclusively to calls to individual residential consumers,⁶ while the scope of the Junk Fax Act is broader and

⁵ 47 C.F.R. § 64.1200(f)(3).

⁶ 47 C.F.R. § 64.1200(a)(2).

focuses on allowing legitimate businesses to communicate with their established customers, whether individual consumers or other businesses.⁷

Moreover, establishing time limits on the duration of the established business relationship is premature. The Junk Fax Act provides that “[B]efore establishing any such limits, the Commission shall— (I) determine whether the existence of the exception ... has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements...(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers; (III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and (IV) determine whether with respect to small businesses, the costs would not be unduly burdensome.”⁸

The Junk Fax Act contemplates that the FCC will make these determinations before it limits the duration of such established business relationships. Until the Commission has compiled a significant record of experience with such established business relationships under the statutory definition – and then sought public comment as required under the Administrative Procedure Act – it should withhold establishing any limits on the duration of such relationships.

Lastly, in the context of Commission consideration of whether limitations on the duration of established business relationships are appropriate, the FCC should recognize that, given the

⁷ S. Rep. 109-76, *supra* note 3.

⁸ Junk Fax Act, § 2(f).

Junk Fax Act's opt-out requirements, such limitations may well be unnecessary. The Junk Fax Act allows a recipient to opt-out of future unsolicited faxed advertisements through an opt-out notice to be included on *every* unsolicited facsimile advertisement. If the recipient has failed to opt-out of future facsimile transmissions, it is fair to assume that the recipient wishes to continue the business relationship.

III.

Rules Regarding Notice of Opt-Out Opportunity.

The NPRM sought comment as to when the opt-out notice required on all unsolicited facsimile advertisements will be considered "clear and conspicuous," as required by the Act.

The Commission should adopt a reasonableness standard for determining whether an opt-out notice is "clear and conspicuous" and facilitate compliance by issuing safe harbor standards. For example, the Commission could determine that an opt-out provision in 10-point font text appearing in black and white satisfies the notice requirement. To avoid confusion, the Commission should also clarify that to the extent the opt-out notice must appear "on the first page of the unsolicited advertisement," under the Junk Fax Prevention Act, such first page is the first page that is transmitted. If a fax cover sheet is used, the opt-out notice should appear on that cover sheet and if no such cover sheet is used, the opt-out notice should appear on the first page of the document that is transmitted.

The FCC also sought comment on whether a sender should be required to honor opt-out requests made by a method not provided for in the sender's opt-out notice. The Junk Fax Act provides that the opt-out notice should contain a domestic contact telephone number, a facsimile machine number and a cost-free mechanism for a recipient to transmit a request pursuant to such

notice to the sender.⁹ A facsimile sender should only face liability for failing to honor opt-out requests made through the options specified in its opt-out notice. Requiring a sender to comply with opt-out requests provided in ways other than those set forth in the required opt-out notice would pose substantial burdens on senders. Businesses must be able to manage and control the methods by which opt-out requests are managed and processed so long as they are in keeping with at least one of the statute's prescribed methods. Requiring them to comply with all opt-out requests, regardless of how made, would inhibit a sender's attempt to comply with the Junk Fax Act.

The Commission should also clarify that a recipient's opt-out request only extends to the specific fax number identified by the recipient via the opt-out mechanism – and not to any other fax number that the recipient might have. To require the sender to locate additional information not provided in the opt-out would impose a substantial burden on the sender and might unknowingly expose them to inappropriate liability where the sender is not on notice that the recipient entity operates under more than one name, has numerous other affiliated business units or shares a facsimile number.

Similarly, such opt-out requests should only apply to the sender's specific subsidiary or division which sent the facsimile. For example, an opt-out request sent in response to an unsolicited facsimile from one subsidiary or division of a company (e.g., a specific radio station) should not be deemed to apply to all other subsidiaries or divisions of that company (e.g., another radio station or an entirely separate subsidiary or division). While CBS will, as most other legitimate business will undoubtedly do, make efforts to honor all opt-out requests submitted, it should only be required to honor those made through the designated opt-out

⁹ Junk Fax Act, § 2(c)(3)(iv).

methods. Moreover, in many instances, the various subsidiaries and divisions of a sender company will have business relationships with various subsidiaries and divisions of a recipient company. As a result, the opting-out of one recipient subsidiary or division should not terminate all of the various relationships the sending company has with other subsidiaries or divisions of the recipient entity.

The NPRM also sought comment on the shortest reasonable time within which a sender must comply with a recipient's request not to receive future unsolicited faxes. As the NPRM notes, the Commission's rules require telemarketers to honor do-not-call requests within a thirty-day period. The period for complying with opt-out requests for unsolicited facsimile advertisements should not be shorter than 30 days.

IV.

Conclusion.

CBS respectfully requests that the Commission modify its rules regarding unsolicited facsimile advertisements as previously noted.

Respectfully submitted,

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